

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
WACO DIVISION

SPACE EXPLORATION ) Docket No. WA 24-CA-203 ADA  
TECHNOLOGIES CORP. )  
 )  
vs. ) Waco, Texas  
 )  
NATIONAL LABOR RELATIONS )  
BOARD, ET AL ) July 2, 2024

TRANSCRIPT OF VIDEOCONFERENCE MOTION HEARING  
BEFORE THE HONORABLE ALAN D. ALBRIGHT

APPEARANCES:

For the Plaintiff: Mr. Michael E. Kenneally  
Morgan, Lewis & Bockius, LLP  
1111 Pennsylvania Avenue, NW  
Washington, D.C. 20004  
  
Ms. Catherine L. Eschbach  
Morgan, Lewis & Bockius, LLP  
1000 Louisiana street, Suite 4000  
Houston, Texas 77002

For the Defendant: Mr. David P. Boehm  
National Labor Relations Board  
Contempt, Compliance and Special  
Litigation Branch  
1015 Half Street, SE  
Fourth Floor  
Washington, D.C. 20003

Court Reporter: Ms. Lily Iva Reznik, CRR, RMR  
501 West 5th Street, Suite 4153  
Austin, Texas 78701  
(512) 391-8792

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14:30:54 1 THE COURT: Good afternoon, everyone.

14:30:55 2 Jen, would you call the case, please.

14:30:57 3 THE CLERK: A civil action in Case 6:24-CV-203,

14:31:02 4 Space Exploration Technologies Corp. vs. National Labor

14:31:05 5 Relations Board, Et Al. Case called for a motions

14:31:07 6 hearing.

14:31:07 7 THE COURT: I'll have announcements from counsel,

14:31:11 8 please.

14:31:15 9 MR. BOEHM: David Boehm for the National Labor

14:31:17 10 Relations Board on behalf of defendants.

14:31:18 11 THE COURT: Is it -- I'm sorry, is it "Bem"?

14:31:23 12 MR. BOEHM: Correct.

14:31:25 13 THE COURT: Thank you, sir.

14:31:26 14 MS. ESCHBACH: Catherine Eschbach on behalf of

14:31:28 15 SpaceX, along with my colleague, Michael Kenneally, who

14:31:31 16 will be handling the argument today.

14:31:32 17 THE COURT: Okay. I thank you all for letting

14:31:34 18 me, on short notice, change the time of the Zoom call. It

14:31:39 19 helped me a lot to be able to have it this afternoon so I

14:31:41 20 appreciate y'all's flexibility.

14:31:43 21 And also, Lily, thank you for being here this

14:31:46 22 afternoon, all-star substitute court reporter who needs no

14:31:53 23 introduction. Otherwise, I'm happy to take the motion up.

14:31:59 24 MR. BOEHM: Thank you, your Honor.

14:32:00 25 Under clear Fifth Circuit precedent, the

14:32:04 1 first-to-file rule requires that when a case shares a  
14:32:06 2 substantial overlap with an existing matter pending before  
14:32:09 3 another district court, the first-filed case takes  
14:32:12 4 precedence and the second-filed case should be stayed,  
14:32:15 5 dismissed, or transferred. The rule exists to avoid  
14:32:17 6 duplicative litigation, to avoid rulings trenching on the  
14:32:21 7 authority of sister courts, and to avoid piecemeal  
14:32:23 8 resolution of issues calling for a uniform result.

14:32:27 9           Calling this case a substantial overlap at the  
14:32:31 10 existing matter in the Southern District would be an  
14:32:34 11 understatement here. The --

14:32:36 12           THE COURT: I'm sorry, where -- which judge has  
14:32:39 13 -- where is it filed in the Southern District?

14:32:42 14           MR. BOEHM: It's at Brownsville. It's Judge  
14:32:45 15 Olvera.

14:32:45 16           THE COURT: Okay. Thank you.

14:32:47 17           MR. BOEHM: So the action's a virtual carbon copy  
14:32:50 18 of two claims from that case involves identical parties  
14:32:54 19 except for an unnamed administrative law judge that's sued  
14:32:58 20 in an official capacity. And here, SpaceX has to win on  
14:33:02 21 the exact same arguments it would have to prevail on in  
14:33:06 22 that first-filed case. And what's more, SpaceX could have  
14:33:09 23 supplemented its pleadings in that case to encompass its  
14:33:12 24 claims here, but perhaps sensing it might not make a  
14:33:15 25 decision it wanted, it decided to try its luck in another

14:33:18 1 court.

14:33:20 2 We believe this is --

14:33:22 3 THE COURT: Wait. What is your basis for saying  
14:33:26 4 that?

14:33:27 5 MR. BOEHM: Well, they filed it in a improper  
14:33:31 6 venue as Judge Olvera found and he issued a decision  
14:33:37 7 transferring that case to California where the locus of  
14:33:43 8 the dispute was, and SpaceX has persistently fought that  
14:33:46 9 decision, including through mandamus petition to the Fifth  
14:33:53 10 Circuit that was ultimately denied by the en banc court.  
14:33:55 11 So it seems as though they have filer's remorse here and  
14:34:00 12 they want to try their luck in a different court that see  
14:34:06 13 if they can get a different result.

14:34:08 14 So our position is that this is not an acceptable  
14:34:11 15 use of judicial resources. It invites the possibility of  
14:34:16 16 the embarrassment of conflicting judgments. And SpaceX  
14:34:21 17 can't muster any convincing argument that the first-filed  
14:34:25 18 rule shouldn't be applied here. I can go into their  
14:34:30 19 arguments if you'd like.

14:34:33 20 THE COURT: I'll give you a chance to respond.  
14:34:35 21 I'll let them make them and then, you'll have whatever  
14:34:37 22 time you want to respond.

14:34:40 23 MR. BOEHM: Okay.

14:34:41 24 THE COURT: But if you have anything else to say,  
14:34:43 25 you're welcome to take as much time as you want to.

1 MR. BOEHM: I mean, the first-to-file rule says  
2 when there's a substantial overlap of issues, the case  
3 should be --

4 THE COURT: Who -- I'm not -- I've not dealt with  
5 this an awful lot. Who determines -- is the job for me to  
6 determine the amount of overlap and if so, what is the  
7 standard I'm supposed to use?

8 MR. BOEHM: So under pretty clear Fifth Circuit  
9 authority, if there's a substantial possibility of  
10 overlap, the second-filed court is the one that -- or the  
11 first-filed court, rather, is the one that should be  
12 deferred to in the case, you know, to determine if both  
13 cases should go forward. We've advocated for a stay here  
14 because there are, at least for the time being, issues  
15 that are holding up that case. We hope to have them  
16 resolved quickly. But we think a stay best accomplishes  
17 the purposes of the rule because once venue is determined  
18 by the first-filed court finally and conclusively, any  
19 transfer can be transferred to the proper court.

20 So, you know, there's no compelling circumstance  
21 that would warrant proceeding with this case and deviating  
22 from a rule that's designed to prevent duplicative  
23 litigation.

24 THE COURT: What about the concern that this is  
25 all just an effort by you all to get this out to a court

14:36:32 1 in California and out of Texas altogether?

14:36:34 2 MR. BOEHM: Well, I mean, I think that's a case  
14:36:39 3 of a hit dog will holler. They were the ones who decided  
14:36:44 4 to file their first case in an improper court as Judge  
14:36:47 5 Olvera found. You know, they sought a venue that was  
14:36:52 6 improper and they have to deal with the results of that  
14:36:55 7 decision. So we are simply applying the standard rules of  
14:37:00 8 litigation and, you know, there's no one responsible for  
14:37:04 9 that but SpaceX and its counsel.

14:37:09 10 THE COURT: You may have responded to my question  
14:37:11 11 and I just didn't hear it. Is the ultimate goal that you  
14:37:16 12 all are trying to accomplish is to get back to California?

14:37:20 13 MR. BOEHM: Well, that all depends on what  
14:37:23 14 happens in the Southern District. If the case is  
14:37:28 15 ultimately not transferred, it's going to have to be taken  
14:37:31 16 up with the Southern District in Judge Olvera's court.  
14:37:34 17 But in any case, this should all proceed in one court and  
14:37:37 18 that's the import of the first-filed rule. You don't get  
14:37:40 19 to maintain essentially the same case under the same legal  
14:37:46 20 issues with unimportant differences against the same  
14:37:55 21 parties.

14:37:58 22 THE COURT: Who determines whether the  
14:37:59 23 differences are unimportant?

14:38:03 24 MR. BOEHM: Under the authorities we laid out in  
14:38:08 25 our papers, the first-filed court should really make that

14:38:13 1 determination once there's a possibility of overlap. So  
14:38:21 2 that's --

14:38:22 3 THE COURT: I'm not following you. So is what  
14:38:24 4 you're telling me, I should stay this and let Judge Olvera  
14:38:29 5 decide whether or not there's overlap? I'm not -- yeah,  
14:38:32 6 I'm sure it's me that's having a problem.

14:38:35 7 MR. BOEHM: I apologize. So I think our position  
14:38:36 8 is until the venue issue is ironed out, this case should  
14:38:41 9 be stayed pending that determination. And then, once it's  
14:38:47 10 decided whether the case is going to remain in Texas or  
14:38:49 11 California, this court should transfer it in accordance  
14:38:53 12 with that determination --

14:38:56 13 THE COURT: Wait, wait. So Judge Olvera's  
14:39:00 14 decision on whether to transfer his case will control  
14:39:03 15 whether I do?

14:39:04 16 MR. BOEHM: Yes. The second-filed court should  
14:39:07 17 normally defer to the first-filed court's determination on  
14:39:11 18 venue.

14:39:13 19 THE COURT: Okay. What if -- is there any  
14:39:16 20 argument on your part that venue is -- let's forget the  
14:39:20 21 first-filed rule for just a second and the order of  
14:39:24 22 filing. Do you have an argument that venue is improper in  
14:39:28 23 Waco?

14:39:30 24 MR. BOEHM: We have not thoroughly examined that  
14:39:34 25 issue. I suspect it may suffer from some of the same

14:39:38 1 infirmities that were true in the Brownsville case. But I  
14:39:41 2 think because the first-filed rule clearly governs here,  
14:39:44 3 we don't have to reach that issue at this point.

14:39:48 4 THE COURT: And what are those venue issues in  
14:39:51 5 Brownsville?

14:39:52 6 MR. BOEHM: Well, the issue we ultimately  
14:39:55 7 prevailed on in the district court was the fact that the  
14:40:02 8 -- a substantial amount -- or a substantial proportion of  
14:40:06 9 the events giving rise to the action did not occur in the  
14:40:10 10 district where they brought the suit where they laid venue  
14:40:13 11 and neither party resided there, and under the applicable  
14:40:17 12 venue provisions, there's no basis for venue in that  
14:40:23 13 district.

14:40:25 14 THE COURT: So if they filed in the Southern --  
14:40:27 15 again, I'm pretty ignorant on this area of the law. I  
14:40:32 16 know some areas very well. Not this one very well. So if  
14:40:37 17 they filed in the Southern District -- and I know you keep  
14:40:38 18 saying they made a mistake, whatever. I'll leave that  
14:40:42 19 alone. But it seems to me, it is beyond argument that  
14:40:50 20 Waco, again, leaving the first-to-file -- I mean, SpaceX  
14:40:55 21 is in Waco so you don't really have an argument that  
14:40:59 22 there's not venue in my -- they don't have venue in my  
14:41:04 23 court, right? I mean, that would be -- can you imagine a  
14:41:06 24 scenario where they would not have venue in my court?

14:41:09 25 MR. BOEHM: I can. If -- the fact that they have



14:41:14 1 a presence in Waco is not sufficient to confer venue over  
14:41:17 2 a dispute. That's essentially a Washington state unfair  
14:41:21 3 labor practice case that's a west coast issue, which this  
14:41:25 4 is. So as I said, we haven't fully --

14:41:28 5 THE COURT: So the fact that -- you know, look,  
14:41:33 6 this isn't -- oh, gosh, I'll pick somebody, this isn't  
14:41:37 7 Acme who has a presence somewhere. SpaceX is in Waco. I  
14:41:41 8 mean, that's -- I mean, in other words, all I'm trying to  
14:41:44 9 make clear so I understand everything is it is -- there's  
14:41:47 10 nothing manufactured -- again, I'm leaving aside the  
14:41:52 11 first-to-file rule. But there's nothing manufactured  
14:41:54 12 about them having filed in Waco, which is -- at least in  
14:41:58 13 terms of where they are located is -- it is the place --  
14:42:06 14 it's very rational from that perspective, is it not? Why  
14:42:08 15 do they have to file where the activities took place? Is  
14:42:13 16 that -- and I'm asking a question. I don't know. Is that  
14:42:15 17 the law?

14:42:16 18 MR. BOEHM: So under the applicable venue  
14:42:18 19 provision, venue's proper where SpaceX resides. That's in  
14:42:24 20 California where their principal place of business is  
14:42:27 21 located where any of the --

14:42:28 22 THE COURT: Is the SpaceX principal place of  
14:42:31 23 location in California or in Waco?

14:42:33 24 MR. BOEHM: California.

14:42:35 25 THE COURT: Okay.

14:42:36 1 MR. BOEHM: So it's proper either where they have  
14:42:38 2 their principal place of business. In the case of  
14:42:41 3 official capacity defendant, it's where they exercise the  
14:42:44 4 duties of their office or it's where, you know, a  
14:42:48 5 substantial portion of the events giving right to the  
14:42:53 6 cause of action arose. So here --

14:42:57 7 THE COURT: Is there a venue statute which  
14:43:00 8 specifically controls? I know in patent law, for example,  
14:43:03 9 there's a specific venue statute. Is there a specific  
14:43:07 10 venue statute that controls this that we can look at that  
14:43:10 11 maybe you cited already?

14:43:14 12 MR. BOEHM: Yeah. Well, I haven't cited it in  
14:43:16 13 this case. Or perhaps I did, actually. It's 28 U.S.C.  
14:43:20 14 1391 is the applicable statute.

14:43:22 15 THE COURT: I'm sorry. 1291?

14:43:24 16 MR. BOEHM: 1391.

14:43:25 17 THE COURT: 1391. Okay. Thank you.

14:43:26 18 MR. BOEHM: Actually, let me look at the papers  
14:43:28 19 just a moment just to make sure.

14:43:29 20 THE COURT: Please do. I mean, there's no hurry  
14:43:31 21 here.

14:43:41 22 MR. BOEHM: Yes, it's 28 U.S.C. 1391. And unlike  
14:43:45 23 patent cases that have virtually unlimited venue  
14:43:47 24 provisions, the venue provisions of that statute are  
14:43:52 25 governed by what's called a perhaps misleadingly

14:43:57 1 transactional venue provision, which involves not simply  
14:44:02 2 transactions but other occurrences, as well. So it does  
14:44:07 3 place limits on a court's venue. It's not virtually  
14:44:10 4 unlimited as it would be in a patent case.

14:44:14 5 THE COURT: Did you -- I may have just  
14:44:17 6 misunderstood you. Did you say that patent venue is  
14:44:19 7 virtually unlimited?

14:44:21 8 MR. BOEHM: I probably misspoke there. I'm sorry  
14:44:23 9 but it's -- I know the venue provisions are quite liberal  
14:44:26 10 in patent cases.

14:44:27 11 THE COURT: It's just the opposite. Have you  
14:44:29 12 seen TC Heartland? I mean, that's exactly the opposite of  
14:44:34 13 what they are. They're extremely not -- they're extremely  
14:44:37 14 limited.

14:44:38 15 MR. BOEHM: Well, I apologize.

14:44:42 16 THE COURT: Okay. Very good. I do know a little  
14:44:45 17 bit about the patent venue laws. So is there anything  
14:44:50 18 else you care to say?

14:44:52 19 MR. BOEHM: I can address their arguments in  
14:44:57 20 rebuttal, I suppose, but nothing that they've laid out  
14:45:01 21 provides a compelling reason not to apply this  
14:45:04 22 well-settled rule.

14:45:05 23 THE COURT: Okay. Got it.

14:45:07 24 A response.

14:45:09 25 MR. KENNEALLY: Thank you, your Honor. And may

14:45:10 1 it please the Court.

14:45:11 2 Defendants' motion, respectfully, would turn the  
14:45:15 3 first-to-file doctrine on its head because rather than  
14:45:18 4 promote comity between courts or judicial efficiency,  
14:45:22 5 defendants are really just proposing to block SpaceX from  
14:45:25 6 obtaining any of the relief it's seeking in this action  
14:45:29 7 for an indefinite period of time. Defendants never argue,  
14:45:33 8 nor could they, that the Southern District case is  
14:45:36 9 positioned to grant any relief for the administrative  
14:45:39 10 proceeding at issue here. Those two actions, the Southern  
14:45:43 11 District action and this action, are asking for relief  
14:45:46 12 with respect to different NLRB proceedings brought in  
14:45:52 13 different regions of the NLRB's geographic offices; and  
14:45:56 14 therefore, there's nothing in the Southern District case  
14:45:58 15 that would provide the preliminary injunction that SpaceX  
14:46:03 16 has moved for here or even permanent relief with respect  
14:46:08 17 to the proceeding that's at issue here.

14:46:11 18 Nor would defendants' proposal expedite or  
14:46:14 19 facilitate any ruling on SpaceX's preliminary injunction  
14:46:17 20 motion in this case or its claims in this case, and that's  
14:46:21 21 because the Southern District case is effectively on hold  
14:46:25 22 in that court while the Fifth Circuit considers SpaceX's  
14:46:30 23 appeal from that court's denial of the preliminary  
14:46:33 24 injunction that SpaceX requested there.

14:46:35 25 So that is why defendants are making the somewhat

1 unusual request here not to transfer this case for now at  
2 least but, instead, to stay the case so that they can  
3 decide at some future date whether they want to ask for  
4 transfer, whether they want to move to dismiss for  
5 improper venue, whatever else they want to do. And that  
6 is exactly the opposite of the attempt to limit piecemeal  
7 litigation that the first-to-file rule is meant to  
8 promote.

9           It's also notable that the defendants have not  
10 asked for a stay pending resolution of Fifth Circuit  
11 appeal. They haven't argued -- they certainly haven't  
12 conceded that a preliminary injunction in that case would  
13 be controlling in this one. If the two cases  
14 substantially overlapped, however, that shouldn't be a  
15 hard concession to make. Instead, both parties seem to  
16 recognize that these are separate cases arising from  
17 separate administrative proceedings. And if the stay  
18 motion that the defendants have made is granted here, then  
19 there won't be any ruling on SpaceX's request for  
20 preliminary injunctive relief for the foreseeable future,  
21 at least until the Fifth Circuit appeal plays out.

22           And by defendants' own concession, they have no  
23 way of knowing when that will happen or when the venue  
24 determination that they're hoping for in the Southern  
25 District to get that case into California might actually

14:47:58 1 happen. They say on page 9 of their motion, it's unclear  
14:48:03 2 at present when such a ruling would occur and that's quite  
14:48:05 3 right. In fact, as SpaceX has argued, that may never  
14:48:09 4 happen because the Fifth Circuit could still provide  
14:48:10 5 guidance on the venue question in the Southern District  
14:48:13 6 case and may reverse the district court's conclusion,  
14:48:17 7 which only escaped en banc review in a writ of mandamus  
14:48:22 8 posture by an eight-to-eight vote.

14:48:23 9 So it's very much a close question whether venue  
14:48:27 10 is proper in that case and the Fifth Circuit may still  
14:48:30 11 weigh in on that because, according to defendants, the  
14:48:33 12 Southern District of Texas cannot afford a preliminary  
14:48:36 13 injunction having ruled that it lacks venue. So that's  
14:48:39 14 very much a live issue in that pending Fifth Circuit  
14:48:42 15 appeal.

14:48:42 16 And defendants haven't argued that there's really  
14:48:46 17 a meaningful risk of conflicting rulings between the two  
14:48:49 18 cases as we've pointed out in our opposition. In fact,  
14:48:52 19 they mostly argue that they don't need to make such a  
14:48:56 20 showing under the first-to-file rule and they accuse us of  
14:48:59 21 misquoting the Save Power case from the Fifth Circuit,  
14:49:04 22 which, in turn, quoted from a First Circuit case called  
14:49:07 23 TPM Holdings. And the quote there, which I think goes  
14:49:10 24 exactly to the question your Honor posed to Mr. Boehm  
14:49:14 25 about who's supposed to decide whether there's substantial

1 overlap and if so, on what basis, there the court, the  
2 Fifth Circuit recognized that where the overlap between  
3 two suits is less than complete, the judgment is made  
4 case-by-case based on such factors as the extent of  
5 overlap, the likelihood of conflict, the comparative  
6 advantage, and the interest of each forum in resolving  
7 this dispute.

8 And the Fifth Circuit, contrary to defendants'  
9 portrayal, has since reaffirmed that rule in the  
10 International Fidelity Insurance case that both sides  
11 discussed. And then, district courts in this circuit have  
12 applied it, as well, including some of the cases we cited,  
13 Louisiana vs. Biden from the Western District of  
14 Louisiana, and Hart vs. Donostia from the Western District  
15 of Texas, and defendants did not grapple with those  
16 courts' invocation of this same standard.

17 Here, we don't think there is a meaningful risk  
18 of conflicting rulings because the two cases target  
19 different NLRB proceedings. And the NLRB concedes in  
20 footnote 8 on page 5 of its reply brief that it could  
21 comply with an injunction in one case even if the other  
22 case isn't enjoined. So the NLRB hasn't argued either  
23 that the Southern District has a greater interest or  
24 ability than this court in resolving the dispute. If  
25 anything, the NLRB has always argued that the Southern

14:50:40 1 District shouldn't be resolving either case.

14:50:41 2           So in all these ways, defendants are attempting  
14:50:44 3 to use the first-to-file doctrine for strategic advantage  
14:50:47 4 and it would not promote judicial efficiency and comity to  
14:50:51 5 do what they're asking this court to do and indefinitely  
14:50:54 6 stay these proceedings. We don't think that the  
14:50:56 7 substantial overlap necessary to invoke the first-to-file  
14:50:59 8 doctrine is present here.

14:51:01 9           But even if there were substantial overlap, we  
14:51:03 10 think there are compelling circumstances for this court to  
14:51:06 11 exercise its discretion not to apply the doctrine and  
14:51:08 12 certainly not to stay this case indefinitely because by  
14:51:12 13 the NLRB's own admission, staying the case will  
14:51:14 14 indefinitely postpone any resolution of SpaceX's timely  
14:51:18 15 filed motion for preliminary injunction. The Southern  
14:51:22 16 District proceedings, as I noted, are effectively on pause  
14:51:24 17 pending the Fifth Circuit's disposition of our appeal and  
14:51:28 18 that is -- that appeal's still in its early briefing phase  
14:51:32 19 and could take many more months to be fully resolved.

14:51:34 20           And the NLRB could reschedule the hearing in this  
14:51:38 21 case anytime it chooses. It didn't withdraw its complaint  
14:51:42 22 or dismiss the charge against SpaceX; instead, it sort of  
14:51:47 23 left the case in limbo and presents the risk that if the  
14:51:50 24 NLRB unilaterally decides to put the hearing back on its  
14:51:55 25 calendar, the parties will have to rush back into court on



1 an emergency timeline and ask for a lifting of a stay, a  
2 renewal of the request for preliminary injunctive relief,  
3 and who knows what else, all on a highly expedited  
4 timetable potentially. And there's no reason to do that  
5 when here, there's a fully briefed preliminary injunction  
6 motion that's already before the Court.

7 I think it's also important to underscore that  
8 the cases that the NLRB is relying on here involves quite  
9 different circumstances where there were, in fact, serious  
10 risks of conflicting judicial rulings. In West Gulf,  
11 there was an intrusion by the second court on the first  
12 court's authority because the core issue in both cases was  
13 the same, whether a particular arbitrable decision in a  
14 labor arbitration was valid, and the second court had  
15 issued an injunction that was inconsistent with the first  
16 court's ruling on that -- on that question of the validity  
17 of the arbitrable decision.

18 In Mann Manufacturing, the second court similarly  
19 interfered with the first court's authority. In  
20 particular, the first court's continuing power to  
21 supervise an injunction that it had already issued. In  
22 Save Power, there was another possible risk of conflicting  
23 injunctions and the courts had, in fact, both courts had  
24 already issued rulings on a creditor's entitlement to  
25 foreclose on a particular debtor's assets that were

14:53:18 1 reconcilable.

14:53:19 2           And then, most recently, in the Chamber Of  
14:53:21 3 Commerce case from the Eastern District of Texas, you had  
14:53:24 4 two cases challenging the same FTC rule, the same agency  
14:53:29 5 action, and in both those cases, the relief sought was  
14:53:32 6 identical. Both plaintiffs wanted that rule vacated in  
14:53:36 7 its entirety and had that been granted in either case, it  
14:53:40 8 would have redounded to the benefit of both plaintiffs.  
14:53:43 9 And the second court in that case was encouraging the  
14:53:46 10 plaintiff to intervene in the first action because it  
14:53:49 11 would have provided the relief that that plaintiff was  
14:53:52 12 seeking.

14:53:53 13           Here again, there's nothing that the Southern  
14:53:55 14 District can currently do to rule on SpaceX's preliminary  
14:53:59 15 injunction motion or resolve the underlying claims while  
14:54:03 16 those issues are up on appeal in the Fifth Circuit. And  
14:54:07 17 to Mr. Boehm's argument that it was improper for us not to  
14:54:13 18 amend the complaint in the Southern District of Texas, to  
14:54:17 19 me, that sounds like a pretty odd suggestion given that  
14:54:19 20 the Court there had found that it lacked proper venue.

14:54:23 21           So the argument would be we were supposed to  
14:54:25 22 amend the complaint to add a claim where the Court lacked  
14:54:28 23 proper venue rather than file in a court which I think  
14:54:31 24 clearly has venue. And in that case, again, we had  
14:54:35 25 already moved at the time we filed this action for

1 reconsideration of the venue decision and there was no  
2 telling when the district court there was going to grant  
3 that motion, act on it one way or the other.

4           So the idea that we had to add this case into  
5 that case despite the huge question mark about what the  
6 status of that case was going to be going forward, I  
7 think, is unrealistic. And finally, the NLRB argues on  
8 pages 5 through 6 of its reply that if we prevail on this  
9 motion, parties would be able to dodge the first-to-file  
10 doctrine in any case. That simply isn't true. A party  
11 can't file actually identical lawsuits over and over again  
12 and SpaceX does not argue otherwise.

13           Here, however, the NLRB made the decision to  
14 initiate a wholly separate administrative proceeding  
15 against SpaceX in a different part of the country  
16 involving different underlying allegations, and in doing  
17 so, it created a new dispute between the parties and it  
18 opened the door to a new lawsuit, as well. I'd be happy  
19 to address any questions that your Honor has.

20           THE COURT: A response.

21           MR. BOEHM: Certainly. Counsel seems to admit  
22 that the purpose of this lawsuit was to get a second bite  
23 of the apple because the first case was not proceeding to  
24 their liking. As to the suggestion that amending the  
25 pleadings or supplementing the pleadings would have been a

14:56:16 1 problem, the first-filed rule teaches us that the  
14:56:21 2 propriety of venue or even jurisdiction in the first-filed  
14:56:24 3 court is not a consideration under the rule.

14:56:26 4 So if they believed that they were in the right  
14:56:28 5 court, they should have stuck to their position and  
14:56:32 6 litigated all these claims in one case before one court.

14:56:37 7 As to the issue of the preliminary injunction,  
14:56:41 8 you know, that issue is not the subject of this hearing.  
14:56:43 9 But I will say with regard to their concerns that we could  
14:56:47 10 reschedule the hearing anytime, I can represent to the  
14:56:50 11 Court that in no case will the hearing proceed before the  
14:56:53 12 original October hearing date. So any sort of unfounded  
14:56:59 13 speculation that we were going to pull a fast one and  
14:57:00 14 schedule it, you know, I'm sure notice is not something  
14:57:05 15 the Court should be concerned about.

14:57:08 16 The other thing I would note is that, you know,  
14:57:12 17 the issue of a stay versus a transfer was one that was  
14:57:16 18 confronted in the Chamber Of Commerce case that they  
14:57:19 19 discussed and the Court ultimately decided the stay was  
14:57:22 20 proper in that case. So I don't think it's a unusual  
14:57:25 21 request as they've characterized it. I think, you know,  
14:57:29 22 there are circumstances that warrant it and cases where  
14:57:31 23 there's confusion about where a case should proceed might,  
14:57:37 24 you know -- is -- was one of the circumstances where a  
14:57:40 25 stay, at least until those issues are ironed out, makes

14:57:44 1 sense.

14:57:48 2 In terms of there's no threat of conflicting  
14:57:51 3 judgments, I think the illogic of that speaks for itself  
14:57:54 4 that this is a -- these two claims are a virtual carbon  
14:58:00 5 copy of the claims in SpaceX 1 and a decision in one court  
14:58:04 6 would be preclusive on the other as between the same  
14:58:06 7 parties. The fact that they arise from different  
14:58:10 8 administrative proceedings is under the first-filed rule  
14:58:15 9 of no import because what we're supposed to look at is  
14:58:17 10 what they have to prove in each case. And the vagaries of  
14:58:23 11 the particular administrative law judge, you know, who's  
14:58:27 12 deciding the case are not important to the ultimate issues  
14:58:29 13 before this court. And the first-filed rule's very clear  
14:58:34 14 that the case does not have to be identical, a substantial  
14:58:39 15 overlap is sufficient.

14:58:41 16 And in fact, in the West Power case that they  
14:58:44 17 discussed, a preliminary injunction which wasn't a final  
14:58:50 18 judgment was sufficiently intrusive on this -- on the  
14:58:54 19 other court's authority that it came within the  
14:58:59 20 prohibition of the first-filed rule. As to the sort of  
14:59:08 21 issue of the appeal holding up the case, we have proposed  
14:59:12 22 a solution that would obviate any need to prosecute the  
14:59:16 23 appeal. We've asked for indicative ruling -- for an order  
14:59:20 24 that would enjoin the administrative proceeding at issue  
14:59:23 25 in the first-filed case. We did that so that we could

14:59:26 1 move that case towards final judgment, which is something  
14:59:29 2 that SpaceX seems to be persistently avoiding. SpaceX has  
14:59:37 3 fought us on that note too even though the relief we've  
14:59:40 4 offered through that order would give them everything they  
14:59:42 5 would get through a successful appeal, and probably more  
14:59:44 6 because it would be -- we'd be precluded from further  
14:59:48 7 challenge to it, but they have not cooperated with that  
14:59:54 8 effort. They seem intent on litigating that to the hilt.

15:00:01 9 And let's see. And just they'd mentioned the  
15:00:17 10 Save Power case, that case is very clear that the  
15:00:19 11 first-filed court is the one that has the ultimate say  
15:00:24 12 over whether both cases should go forward. So I think we  
15:00:27 13 should preserve that court's ability to adjudicate the  
15:00:32 14 issues before it and we ask the Court issue a stay or, you  
15:00:39 15 know, if it decides dismissal or transfer is proper, we  
15:00:42 16 would not oppose that, as well.

15:00:46 17 THE COURT: Any response?

15:00:48 18 MR. KENNEALLY: Thank you, your Honor.

15:00:52 19 You know, I think the one thing that came through  
15:00:55 20 clearly is that there isn't a way for SpaceX to get a  
15:01:01 21 ruling on its preliminary injunction motion that's already  
15:01:04 22 briefed. And the representation that it won't go back on  
15:01:08 23 the calendar before the end of October isn't a lot of  
15:01:12 24 comfort given how fast moving the parties would need to be  
15:01:18 25 and the courts would need to be to issue a ruling in just

1 under a few months if that were to happen. We don't know  
2 when it would go on the calendar and these actions, both  
3 of them have seen a lot of motions practice already. So I  
4 think that the issuance of the stay really just runs the  
5 risk of more fast-moving motions practice later on.

6 The Save Power case, I disagree, says that only  
7 the first court decides whether there's substantial  
8 overlap. What the Court was saying there is that once the  
9 second court finds that there is substantial overlap,  
10 which would be something that this court would need to  
11 determine about this case, then whether the second case  
12 should move forward is presumptively an issue for the  
13 first court to resolve. But here, as we've argued, there  
14 isn't enough substantial overlap because the two cases  
15 deal with separate NLRB proceedings. Other than that,  
16 your Honor, I don't have a further response.

17 THE COURT: Very good. I'll be back in a few  
18 minutes.

19 Okay. The issue before the Court is whether or  
20 not to stay the case. The Court is not going to stay the  
21 case. I am going to set it for a preliminary injunction  
22 hearing. I think I'm free next week. Is there a date  
23 next week that works particularly well for you? Well,  
24 actually, my clerk will reach out to you and we'll get a  
25 date and we could do that.

15:07:31 1 What I would ask the parties to do -- and I may  
15:07:33 2 butcher the name. I apologize in advance. But we're  
15:07:38 3 aware and y'all are, too, I'm certain, of the SEC vs.  
15:07:43 4 Jarkesy, or J-A-R-K-E-S-Y, case. If there's any briefing  
15:07:48 5 you want to do based on what was held in that case for us,  
15:07:52 6 that would be extremely helpful. We think it's relevant  
15:07:54 7 to what we're going to do.

15:07:56 8 Having said that, is there anything else we need  
15:07:58 9 to take up at this time?

15:08:06 10 MR. KENNEALLY: Not from our perspective, your  
15:08:09 11 Honor.

15:08:09 12 MR. BOEHM: Just as a housekeeping matter in  
15:08:10 13 terms of the scheduling, is the case manager going to  
15:08:13 14 reach out to us about a time?

15:08:14 15 THE COURT: Yes.

15:08:15 16 MR. BOEHM: Okay.

15:08:16 17 THE COURT: Yeah. I've got a great staff and so,  
15:08:20 18 maybe as early as today. But no. We do our best to try  
15:08:23 19 and accommodate y'all's schedules if we can but I would --  
15:08:27 20 I plan on doing it next week for sure. So my clerks are  
15:08:34 21 texting me. I don't really have a case manager. I have  
15:08:36 22 four phenomenal clerks so one of them will be reaching out  
15:08:40 23 to you and getting it arranged.

15:08:43 24 MS. ESCHBACH: And, your Honor, should we plan  
15:08:45 25 for that to be in person or will it likely be over Zoom?



15:08:49 1 THE COURT: I'm happy to do it by Zoom. I'm  
15:08:52 2 happy to do it -- next week, I am mostly in Austin. I'm  
15:08:58 3 in Austin, I think, Monday, Thursday and Friday and then,  
15:09:01 4 Waco, Tuesday in a hearing and Wednesday in sentencings.  
15:09:05 5 So, you know -- but why don't we plan on doing this.  
15:09:10 6 Let's plan on doing it -- my clerks said the best time for  
15:09:13 7 us, our availability is in Waco, next Wednesday afternoon.  
15:09:20 8 Let's plan on doing it at 2:00 in the afternoon next  
15:09:23 9 Wednesday in person.

15:09:28 10 Anything else? Okay. I hope you guys have a  
15:09:36 11 happy 4th of July. Take care. We'll see you next week.

15:09:40 12 MR. BOEHM: Thank you, your Honor.

13 (Proceedings concluded.)

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UNITED STATES DISTRICT COURT )

WESTERN DISTRICT OF TEXAS )

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*LILY I. REZNIK, CRR, RMR  
Official Court Reporter  
United States District Court  
Austin Division  
501 West 5th Street,  
Suite 4153  
Austin, Texas 78701  
(512) 391-8792  
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